

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER

In an Opinion and Order dated May 18, 2007 (Doc. 23), the court stated:

The [undersigned] agrees with the Defendant that, absent evidence of CSX's replacement of the handbrake housing components, Mr. Daum's examination would satisfy the "remoteness" and "substantial similarity" tests annunciated above. Simply put, if none of the subject parts were replaced, their condition could only have deteriorated over the course of the Car's additional use, not improved. The Plaintiff, however, questions the veracity of CSX's evidence[.]

[T]he Plaintiff's argument begs the question of how CSX can "prove a negative," namely, that the gear housing components were not replaced despite the lack of any evidence they were. In the court's view, this could be established by the sworn statement(s) of an appropriate CSX representative stating on personal knowledge that, if any repairs were made to the Rail Car, they would be reflected in the AAR-CRB History or some other existing documentation. If Defense counsel is capable of producing such evidence, CSX's failure to provide documentation regarding a purported "annual brake test" in 2006 would be immaterial.

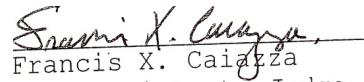
Id. at 5-7.

Consistent with this reasoning, the court invited the Defendant to submit, if it could, an affidavit "eliminat[ing] reasonable doubt regarding whether the Car's handbrake housing components were replaced." *Id.* at 7. CSX has done so, see Doc. 26,¹ and Mr. Daum therefore will be permitted to offer opinions and testimony regarding the handbrake housing components based on his November 2006 inspection.

Otherwise, the remainder of the court's May 18th Opinion and Order remains unaffected.

IT IS SO ORDERED.

June 1, 2007


Francis X. Caiazza
U.S. Magistrate Judge

cc (via email):

Charles A. Frankovic, Esq.
Anthony J. Rash, Esq.

¹ Specifically, CSX's General Foreman Paul M. Davidson has stated, on personal knowledge, that "[i]f any repair work was performed on the handbrake housing . . . between October 27, 2005 and November 9, 2006, any and all such service work . . . would have been recorded in the [C]ar's AAR-CRB History." *Id.* at ¶ 5.